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Nos. 86-393 and 86-443

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, et al.,
Petitioners,

vs.

JAMES B. STANLEY,
Respondent,

-and-

BOARD OF REGENTS OF THE UNIVERSITY OF MARYLAND, et al.,
Petitioners,

vs.

JAMES B. STANLEY,
Respondent.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

In framing the questions presented for review, the United States and the other Federal Petitioners in Case No. 86-393 include matters which are in dispute. For example, it is in dispute whether Plaintiff was on "active duty" status while participating in an "official Army drug experimentation program," and it is in dispute that an appealable partial final judgment was ever entered in favor of the United States. It is also disputed that Plaintiff is suing his "superior officers." Concerning the question framed by the State Petitioners in Case No. 86-443, there is nothing in the record to substantiate that the "state civilian employees at all times acted under federal military direction and control." We therefore feel constrained to restate the questions presented as follows:

1. Whether the Court of Appeals erred in reopening the law of the case as established in a previous appeal, when controlling authority had changed during the interim.

2. Whether the Court of Appeals erred by finding this Court's decision in *Chappell v. Wallace*, and its rationale, to be distinguishable from the unique facts alleged in the present case.

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ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, James B. Stanley, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's decision in this case. That opinion is reported at 786 F.2d 1490 and republished at (1a-20a).[1]

1. All references herein (eg. 1a-20a), are directed to the Appendix to the Petition for Certiorari filed by the United States of America, Case No. 86-393.

STATEMENT

There are some incorrect assertions in the statements of both Petitioners, as well as some statements outside the record. Also, some important facts which make this case more unique (and less "certworthy") have been omitted from the Petitioners' statements. We therefore supplement the statements as follows.

The Eleventh Circuit below mentioned some of the important facts in its opinion. (2a-3a). The district court judge elaborated further in his most recent opinion. (22a-23a).

The plaintiff did not volunteer to participate in any drug testing. He was not a true "volunteer," nor was he under any orders, nor was he taking advantage of a military privilege, nor was he on his regular duty status at the time in question.

While he was a master sergeant in the U.S. Army, Plaintiff volunteered to participate in a program ostensibly for the testing and development of various gas masks and protective clothing to be used as a defense against chemical warfare attack. There was no compulsion but he was promised that letters of commendation would be put in his file and he was released from his regular duty status for approximately a month. At any time Plaintiff desired he could withdraw from the program and return to his regular duties. There is no evidence as to his technical duty status during that month.

Plaintiff was deliberately given false information about the program in order to extract his consent to volunteer. The real purpose of the program was to observe Plaintiff's "unwitting reaction" to LSD, which was secretly introduced into his bloodstream on four occasions by being mixed

with his drinking water, while he carried out the charade of testing gas masks and clothing. Defendants intentionally withheld the true facts for the next eighteen years since it was an integral part of the program to have unwitting human subjects for experimental drug testing.

When Plaintiff unknowingly ingested this dangerous drug on four occasions in February 1958, he experienced severe reactions including hallucinations, but had no idea what was happening. Hallucinogenic drugs such as LSD were virtually unknown to the public in 1958. Eventually Plaintiff returned to his active duty at Fort Knox, Kentucky, but he continued to have recurrent episodes. He periodically lapsed into periods of incoherency, sometimes marked by violence, and he had no recall of such events afterwards. On one occasion he awoke from sleep late at night and, without reason, violently beat his wife and children later being unable to recall the event.

Plaintiff's inexplicable behavorial changes eventually resulted in the breakdown and dissolution of his marriage and family life. (22a-23a, n. 2). He was thereafter unable to perform his military duties efficiently and was reduced in rank for inefficiency. At times he would be absent without leave and could not recall his whereabouts when questioned. Before the drug testing he had an unblemished record; he had earned various military honors and intended to pursue a promising military career.

In 1969, Plaintiff retired from the army. He did not bring an FTCA action in 1975 as Petitioner (the United States) indicates. In December of 1975, he received a letter from the Department of the Army, Walter Reed Army Medical Center, which disclosed for the first time that he had been given LSD during February, 1958. The letter solicited his participation in a follow-up study of

the "volunteers" who participated in the 1958 LSD experiments. Plaintiff filed administrative claims with the United States Army, which were denied with the statement that there was no appropriation available to pay such a claim and that if Plaintiff was dissatisfied he should file an action in federal district court. (70a, n. 5). Plaintiff thereafter filed this action in the district court in May, 1978. (3a).

In the first appeal to the fifth circuit, the fifth circuit did not affirm an order dismissing the FTCA claims, as Petitioner states. Rather, the fifth circuit vacated a summary judgment on grounds that the district court had no subject matter jurisdiction to enter any judgment in favor of the government and, at most, it could only dismiss the FTCA claim, without prejudice, if the government was immune from suit. (67a-95a).

Next the Petitioner states that, after remand from the first appeal, the district court entered a partial final judgment in favor of the United States on November 9, 1982, which was never appealed. That is not exactly what happened. The district court entered an interlocutory "order" directing the clerk to enter a partial final judgment in favor of the United States (54a-55a), however the clerk never entered any final judgment on the civil docket. (See Appendix "A" to this brief). There was therefore no final judgment from which to appeal, as discussed in more detail *infra*.

Finally, the eleventh circuit below, in the second appeal, held that a case-by-case analysis is required under *Chappell*[2] to determine whether a particular *Bivens*[3] suit

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2. *Chappell v. Wallace*, 462 U.S. 296 (1983).

3. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

would undermine military discipline *if* the facts of the case appear to fall outside the typical *Feres*[4] factual paradigm. The government's Petition for Certiorari, at pages 6 and 11, omits the last half of this statement. (As the eleventh circuit also stated in *Cole v. United States,* 755 F.2d 873, 877, n. 11 (11th Cir. 1985), "We do not imply that such a case-by-case analysis is required in all cases.")

Also, in this regard, both the United States and the state defendants repeatedly assert in their Petitions that Plaintiff is suing his "superior officers" for constitutional violations, which is prohibited by the *Chappell* decision. We dispute that. We believe the evidence in this case, if we are allowed to present it, will indicate that the various different individual defendants, some of whom are civilian personnel, some are doctors, others are non-military federal executive officers, a university, and others yet to be discovered and named; have different degrees and types of involvement in the 1958 covert LSD drug experimentation program. Their relationship to each other and to the plaintiff is not yet developed by the record since this case is still at the pleading stage without an answer having yet been filed or any substantial discovery undertaken. (The eleventh circuit appeal was an interlocutory appeal.) Whether some or all of the defendants are "superior officers" in a disciplinary or military context within the contemplation of this Court's opinion in *Chappell* cannot yet be determined as it can on plenary appeal. There is also no record yet to develop how the LSD testing supposedly related to military service, which is pertinent to the *Feres* and *Chappell* analysis.

For this reason, this Court would be in a far better position to review these issues on a plenary appeal from

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4. *Feres v. United States,* 340 U.S. 135 (1950).

a final judgment after a full record has been developed, as discussed *infra*. In this same vein, both Petitioners also repeatedly state that all the individual defendants were acting under the control of the army and pursuant to military orders. The state defendants assert in their Petition that they had nothing to do with the development of this program, or the contract under which they acted, but they were merely ministerial characters controlled by the army, with no individual authority.

Suffice it to say, once again, that these assertions are completely outside the record. Certainly the federal defendants have never admitted that they completely controlled the state defendants and, because of the potential conflicts, the separate groups of defendants are being separately represented and are filing separate Petitions for Certiorari.

The state defendants assert (at page 17 of their Petition) that they "were admittedly minor figures in a federal military program." To our knowledge, nobody except the state defendants has admitted any such thing. There is no evidence yet whether they were civilian employees, independent contractors, or even joint venturers. There are not even any sworn allegations to this effect. The state defendants admit (at page 15 of their Petition) that we have had virtually no pre-trial discovery of their involvement, however they argue that we should not be able to discover anything about their contractual involvement because that would involve "inquiry into, and second guessing of military orders."

It is against this background that we respectfully urge this Court to conclude that the issues in this case are not "certworthy."

REASONS WHY THE PETITION SHOULD BE DENIED

I. General Certworthiness

The Petitioners assert generally that the issues in this case are of great practical importance to the armed forces and to civilian employees. That is only true if there are many other similarly situated plaintiffs who were fraudulently induced to become human subjects for LSD experiments. The government has never admitted that.

In truth, this case involves a very narrow holding based on a unique factual situation. The district judge (a nine year veteran on the fedral court and a state trial judge for fourteen years before that) stated: "This Court has seen few cases which more desparately cry out for and demand judicial redress." (51a). This case presents shades of an Orwellian novel where even one's own creative thought process is altered and controlled by the government. The district judge noted: "The acts alleged to have been committed by the officers and agents named as defendants in this case are insidious to the most fundamental rights protected by our Constitution: the right of an individual to control his mind, his private thoughts, and his bodily integrity." (51a). "The conduct alleged in this case would shock—if not outrage—the conscience of any court, and is most certainly protected against by the Constitution of the United States." (65a). Obviously, this is not a garden variety *Feres* or *Chappell* type case, and it is not likely to be a recurring fact pattern. We know of no other case that will turn on this one.

Perhaps even more importantly, the interlocutory nature of this case makes certiorari review by this Court

inappropriate. This Court has indicated on a number of occasions that it will not grant certiorari to review a nonfinal order except in extraordinary circumstances. Eg. *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372, 384 (1893); *Cobbledick v. United States*, 309 U.S. 323, 324-325 (1940); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1915); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967). Although the eleventh circuit below ultimately accepted review of the interlocutory order certified for appeal, one panel on the eleventh circuit initially declined to accept interlocutory review even at that level. (See Appendix "B" to this brief.) That says something about the certworthiness of this case at the Supreme Court level.

The federal defendants have also petitioned this Court to review the eleventh circuit's decision in *Johnson v. United States*, 749 F.2d 1530 (11th Cir. 1985), reinstated en banc, 779 F.2d 1492 (1986), which was cited by the eleventh circuit in the present case, and they argue that this Court should certainly accept certiorari in this case if it does so in *Johnson*. We disagree because, although we concur with the eleventh circuit's decision in *Johnson*, there are material differences between the two cases. In fact, the district judge who dismissed the *Johnson* case was the same judge who refused to dismiss this case.

First, *Johnson* has nothing to do with a *Bivens* action against individual federal officers.

Second, counsel representing *Johnson* before this Court have admitted there is a direct conflict on identical facts between circuit courts on the issue decided in *Johnson*. That is not the case here, however, since this case is factually distinguishable and this case raises serious ques-

tions about Plaintiff's active duty status, unlike *Johnson*. The injury in this case did not occur during the course of a military rescue operation as in *Johnson*, but rather, under circumstances far more attenuated from military service.

Third, the *Johnson* case went up to the eleventh circuit on a plenary appeal from a final order dismissing the case with prejudice, rather than on review of an interlocutory order as in this case.

Fourth, and perhaps most important, the *Johnson* case will govern all incidents of military air accidents in which FAA or other non-military personnel may arguably be negligent. Obviously that is a fact pattern capable of recurring time and again, which makes that case far more "certworthy" than this one. We do not believe (certainly we hope) the facts of *this* case would ever again occur in this country.

Fifth, the plaintiff in *Johnson* received a full range of Veterans' Benefits before bringing an FTCA action, however in this case such administrative benefits are not available. This case is entirely independent of *Johnson;* it is far narrower in application and less certworthy.

II. FTCA Claim

The government's main argument is that the eleventh circuit exceeded its jurisdiction by resurrecting the FTCA claim after the district court had entered an order pursuant to Rule 54 (b) for a partial final judgment, which (the government says) should have been appealed when it was entered. However, as stated above, no final judgment was entered by the clerk on the civil docket pursuant to the court's Rule 54 (b) order directing the clerk to enter

it, nor was any notice of entry of judgment mailed by the clerk to the parties pursuant to Rule 77 (d).

Under F.R.C.P. 54 (b), the district court may "direct the entry of a final judgment" as to fewer than all of the parties by making "an express direction for the en. of judgment" to the clerk. Here, the district court "ordered that the clerk enter final judgment in favor of the United States." (54a-55a). However, that "order" is not self executing and is not appealable. (From its own language, the order was obviously not intended to be self executing.)

F.R.A.P. 4 (a)(6) provides that a judgment is "entered," for appeal purposes, when it is entered in compliance with Rules 58 and 79 (a) of the F.R.C.P. Rules 58 and 79 (a) require the clerk to "enter" the judgment, as a separate document, on the civil docket, and provide that it shall only be effective when that has been accomplished. See also Form 32, appended to the F.R.C.P. The federal courts have repeatedly noted that until the clerk enters a separate judgment on the civil docket pursuant to Rules 58 and 79 (a), the appeal time does not begin to run. *United States v. Indrelunas*, 411 U.S. 216 (1973); *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978); *Ferrell v. Beatrice Pocahontas Co.*, 585 F.2d 683 (4th Cir. 1978); *Rappaport v. United States*, 557 F.2d 605 (7th Cir. 1977).

Even if the clerk had followed through and entered a final judgment on the civil docket, it still would not foreclose a later inquiry into the partial final judgment for several reasons. First, the district court had no subject matter jurisdiction to enter a partial final judgment for the United States on grounds of sovereign immunity; at most, all it could do was dismiss the action without prejudice for the reasons explained in *Stanley v. Central Intel-*

ligence Agency, 639 F.2d 1146 (5th Cir. 1981). Lack of subject matter jurisdiction can be raised at any time in the litigation and cannot be waived by any party's action or inaction. F.R.C.P. 12 (h); *Kain v. Winslow Mfg., Inc.*, 736 F.2d 606 (10th Cir. 1984); *Eagerton v. Valuations, Inc.*, 698 F.2d 1115 (11th Cir. 1983).

Second, we would have been hard pressed in 1982 to appeal the partial final judgment back to the fifth circuit since it was based on the fifth circuit's opinion in this case in 1981 in *Stanley v. C.I.A., supra*. It probably could have been changed to become a dismissal of the United States instead of a final judgment, but nothing substantive could possibly have been accomplished since the appellate court had just ruled on the Plaintiff's FTCA claim. The government would probably have characterized such an appeal as frivolous.

Third, even if there had been a final judgment entered which was not appealed, Plaintiff would now certainly have a viable motion for relief from that judgment under Rule 60 (b), for reasons number (4), (5) and (6) listed under that rule. The eleventh circuit's opinion in this case could be construed to simply support a Rule 60 motion for relief from judgment when the case returns to the district court on remand.

Apart from the procedural issue concerning the Rule 54 (b) order, the federal petitioners do not seem to challenge the eleventh circuit's discussion of how an appellate court that has once created the "law of the case" can reopen the issue in a later appeal when controlling authority has changed in the interim or manifest injustice would otherwise result. See also *Westbrook v. Zant*, 743 F.2d 764 (11th Cir. 1984); *Yamamoto v. Omiya*, 564 F.2d 1319 (9th Cir. 1977); *Lehrman v. Gulf Oil Co.*, 500 F.2d 659 (5th Cir. 1974).

The federal petitioners are incorrect in stating (at page 11) that there is no dispute Plaintiff's injuries were incurred incident to military service. Although the fifth circuit so held in the first appeal in this case (67a-95a), we disagreed then and we still dispute it. The fifth circuit focused on the Plaintiff's having "volunteered" for the program and cited a string of "volunteer" cases (72a-73a); but overlooked the fact that Plaintiff was not a true volunteer because his consent had been fraudulently extracted.

The fifth circuit also expressed reliance on the fact that the drug experiments occurred on a military base. (75a). Since that time, this Court has discounted the importance of that one fact. In *United States v. Shearer*, 473 U.S. ....., 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985) this Court noted that *Feres* seems best explained by the military discipline rationale, and that other rationales sometimes advanced in the past to support the *Feres* doctrine are "no longer controlling." *Shearer*, 105 S.Ct. 3043, n. 4. This Court stated, "the situs of the [incident] is not nearly as important as whether the suit requires the civilian court to second-guess military decisions." *Id.* at 105 S.Ct. 3043.

An activity should be deemed "incident to military service" only when the policy factors that support the doctrine are applicable to the facts. When the reason for the doctrine does not apply, the doctrine itself should not be applied. As this Court stated in *Shearer*, "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined. . ."

The Plaintiff here was not on his regular active duty status while at Edgewood Arsenal during the testing program. The eleventh circuit noted this in its opinion below. (12a). Plaintiff was released from his duty status

at Fort Knox, and while at Edgewood Arsenal, he had complete control over his movements (when he was not drugged). At any time, he could withdraw from the program and return to Fort Knox. There is no evidence as to any disciplinary relationship between Plaintiff and anyone else at the testing laboratories. There is no evidence as to his technical duty status during that month. There is also no record of how the LSD testing supposedly related to Plaintiff's military service.[5]

This case is unlike the cases relied on by the Petitioners. There is no questioning of direct military orders involved here (unlike the atomic testing cases), no threatened effect on performance of military duty or discipline, no facts involving the special nature of military life, the Plaintiff was not availing himself of one of the benefits of military service when the incident occurred (unlike the cases involving medical negligence by military doctors during the course of rendering free medical care to servicemen), nor is this case similar to the typical "volunteer" cases since Plaintiff never gave an informed consent to any drug experimentation.

Nor does this case require a civilian court to second-guess the wisdom of military decisions. The allegations here raise a case of patent illegality and violation of the Nuremberg Code, not just a question of the wisdom of military decision-making. Human experimentation of this nature has been condemned and declared illegal by every pertinent statute and regulation of the United States and by international standards. See *United States v. Karl Brant, et al.*, 2 Trials of War Criminals Before Nuremberg

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5. The mission of the army is to preserve peace and security, provide for the defense, support and implement national policies and objectives, and to overcome other aggressive nations. 10 U.S.C. §3062.

Military Tribunals, 181, 182 (1949). The Nuremberg Code has been adopted by the AMA and by the Chief of Staff and the Secretary of the Army, Navy and Air Force.[6]

A mechanical application of the *Feres* doctrine, in a case falling outside the rationale of *Feres,* would be inconsistent with the purpose of the Federal Tort Claims Act. If the *Feres* doctrine is to be applied regardless of whether the rationale applies, then American servicemen are reduced to a worse position than federal prisoners who may sue the government under the FTCA for negligence of prison officials. *United States v. Muniz,* 374 U.S. 150 (1963).

Additionally, even if the Plaintiff's activity at the testing laboratories is deemed incident to his miltary service, the reasoning of the eleventh circuit in *Johnson v. United States,* 749 F.2d 1530 (11th Cir. 1985), approved en banc 779 F.2d 1492 (1986), is sound and should be approved, if this Court reaches the merits in *Johnson.* It presents a balanced approach between the rationale behind the *Feres* doctrine and the public policy underlying the Federal Tort Claims Act. If the tortfeasor is not a member of the armed forces nor a civilian employee engaged in activities usually associated with the armed forces, *then* the Court should consider the rationale supporting the *Feres* doctrine to determine to what extent, if any, the allowance of the claim would circumvent the purpose of the doctrine. (LSD experimentation is not an activity usually associated with the armed forces.) If the prosecution of the claim would not compromise the military disciplinary structure nor otherwise encroach upon the

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6. There are supporting documents in the original record in this case described at R. 73-74, 140, 141-146, which were placed in a separate brown envelope—See R. 140.

rationale of the *Feres* doctrine, then there is no sound reason for barring the action.

III. Bivens Claim

Even if the *Feres* doctrine does apply here to preclude the FTCA claim against the United States, the eleventh circuit was correct in finding that it would not necessarily preclude the *Bivens* action against the responsible individual federal defendants. The eleventh circuit carefully distinguished this case from *Chappell v. Wallace*, 462 U.S. 296, 103 S.Ct. 2362 (1983), by noting how the "special factors" present in *Chappell* are not present in this case.

In *Chappell, supra*, the defendants were all clearly "superior officers" (unlike the present case) consisting of the commanding officer and other officers on a navy combat vessel, who were being sued by enlisted navy men aboard the vessel. The Plaintiffs in *Chappell* claimed that because of their minority race the officers on board failed to assign them to desirable duties and gave them low performance evaluations, thus impeding their advancement in the navy. There is a world of difference between those allegations, which clearly involve command decisions affecting the Plaintiffs, and the allegations in the present case. This Court's holding in *Chappell* was premised on the need for knee-jerk reflex obedience to orders from superior military officers, and the disruption *in that type of case* that might result "if the soldier were allowed to hale his superiors into court."

The Petitioners rely on this Court's seemingly broad statement in *Chappell;* "We hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional viola-

tions." (103 S.Ct. at 2368). However, in context, this Court did not say it was creating a "per se" prohibition on all *Bivens* actions whenever the *Feres* doctrine would preclude an FTCA suit against the government. In fact, this Court noted it was dealing with a nonstatutory, constitutional remedy rather than Congress' intent behind the FTCA, and this Court stated; ". . . The Court's analysis in *Feres* 'guides' [not 'controls'] our analysis in this case." *Id.* at 2365. This Court specifically cautioned that its decision should not be read to mean that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service. *Id.* at 2367.[7]

The federal petitioners argue that this Court should accept certiorari because the eleventh circuit's decision directly conflicts with the decisions of three other circuits in *Mollnow v. Carlton,* 716 F.2d 627 (9th Cir. 1983); *Gaspard v. United States,* 713 F.2d 1097 (5th Cir. 1983); and *Jaffee v. United States,* 663 F.2d 1226 (3d Cir. 1981). That is not the case. In fact, those cases were expressly distinguished by the district judge in this case. (32a-33a).

Although in *Mollnow,* the ninth circuit seems to interpret *Chappell* as imposing a per se prohibition against *Bivens* actions, one month later the same court (through a different panel) seemed to take a different view of *Chappell.* See *Gonzalez v. Dept. of the Army,* 718 F.2d 926, at

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7. Petitioners argue that the cases cited by this Court for this proposition in *Chappell* were not civil damage lawsuits, but habeas corpus or injunction cases, and therefore civil lawsuits for damages are still prohibited per se. Petitioners fail to explain how habeas corpus or injunction cases are any less disruptive or intrusive, or why they may not also involve second guessing military decision making. This is not a logical distinction. The nature of the relief sought is not nearly as important as the potential impact of the case on the military disciplinary structure, and that depends on the facts of the case.

929 (9th Cir. 1983). *Gaspard, supra,* and *Jaffee, supra,* are easily distinguishable. The Plaintiff here was not acting pursuant to direct orders, unlike the nuclear testing cases such as *Gaspard* and *Jaffee.* As the eleventh circuit below noted:

> Because he was surreptitiously administered the drug, Stanley could not possibly have challenged his 'orders' to drink the clear substance. 'The inescapable demands of military discipline and obedience to orders' are not implicated by the facts of this case. (12a).

The "direct conflict" asserted by the Petitioners, for which they ask this Court to accept certiorari, does not really exist.[8]

Contrary to the statement by the federal petitioners (at p. 16, n. 11), the federal courts are not unanimous in reading *Chappell* to be a per se prohibition of *Bivens* actions by military servicemen under all circumstances. In addition to the eleventh circuit in this case, the eighth circuit recently took the same flexible approach and expressly rejected the "per se prohibition" interpretation of *Chappell.*

In *Brown v. United States,* 739 F.2d 362 (8th Cir. 1984) the court applied this Court's language in *Chappell* and went on to analyze whether the rationale of the *Feres* doctrine would be fulfilled by applying it to the facts before the court. The court concluded that the case presented such a "unique factual situation" that the Plaintiff should be able to bring a *Bivens* action even though an

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8. The Court in *Gaspard* expressly stated that "it is crystal clear that *Bivens* claims are distinct from FTCA actions, and the *Feres* bar therefore does not automatically preclude the *Bivens* claim." 713 F.2d at 1102. See also *Gaspard, supra* at 1105, n. 17.

FTCA claim could not be prosecuted under the *Feres* doctrine. This Court denied certiorari in *Brown* (see 105 S.Ct. 3524) and should, for the same reasons, deny certiorari in this case which presents the same issue as *Brown*.

The present case involves facts even more unique than in *Brown, supra*. This case does not involve or threaten to compromise military discipline, nor the "special nature of military life." A case like this could easily involve a civilian, as much as a military serviceman.

A trial in this case would not involve second guessing of any military orders directed to this Plaintiff, since he was under no orders. The petitioners argue it could ultimately involve an inquiry into higher echelon military decision-making. However, if that was the standard for prohibiting a *Bivens* action in any case, no matter what kind of wrongful act may be perpetrated on a serviceman, the defendants could always remain immune by asserting their act was a result of "military decision-making."

The acceptance of the "per se immunity" rule argued for by petitioners under the type of facts in this case would be tantamount to admitting that because of Plaintiff's military status, federal officers can willfully and knowingly violate his constitutional rights without fear of accountability in the civil justice system. Would such a rule promote discipline in the military or encourage corruption? What would be the effect on morale and discipline if the judiciary countenanced (by ignoring) such patent illegality? To deny Plaintiff civil redress under these circumstances would do more to undermine military discipline than to permit recovery.

This Court has held that even a convicted and incarcerated federal prisoner may bring a *Bivens* action against

prison officials for violation of constitutional rights, under compelling circumstances. *Carlson v. Green*, 446 U.S. 14 (1980). Likewise for an FTCA action alleging negligence of prison officials. *United States v. Muniz*, *supra*. If the disciplinary structure within our prisons is not so overwhelming under all circumstances to preclude a civil lawsuit, should it be so in the military? By arguing for a "per se" prohibition against allowing a *Bivens* action in this case, the government is actually saying that an army master sergeant like Mr. Stanley should be relegated to a position inferior to that of a convicted and incarcerated federal prisoner. What kind of rational policy can justify such an anomalous result?

The federal petitioners also discuss, in general terms, the possibility of veterans benefits that may be available to Plaintiff. The petitioners have failed to specify at any time in this litigation what particular veterans benefits cover this type of claim and compensate for the type of injury that has been suffered here. The petitioners argue that there does not have to be "adequate" administrative compensation available, so long as Congress has shown some "activity in the field," which by itself creates a "special factor" that militates against allowing a *Bivens* action.[9] That is not an accurate statement of the current law.

Unless this Court intended in *Chappell*, *supra*, to silently modify the rule in *Carlson v. Green*, 446 U.S. 14 (1980), there must be a showing that Congress has provided an alternative remedy which it *explicitly* declared to be a substitute for recovery under the Constitution.

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9. The federal petitioners appear to concede at footnote 12, page 18 of their Petition for Certiorari, that the Veterans Benefits Act does not provide this Plaintiff with an adequate alternative remedy.

before this will automatically preclude a *Bivens* action. *Carlson, supra* at 446 U.S. 19-20. The alternative remedial scheme must be equally as effective as the damages action. *Id.* at 446 U.S. 18-19.[10] Mere "activity in the field" by Congress is just one factor that goes into the equation, but it is not by itself overriding. It was not "ignored" by the eleventh circuit below, as petitioners argue (at p. 18, n. 12). The eleventh circuit expressly considered it but concluded "that this factor also does not militate against permitting Stanley's Bivens claim." (12a).

The eleventh circuit, of course, did *not* hold that *Chappell* is limited only to cases involving the Code of Military Justice as an alternative compensation scheme. The argument of the federal petitioners to that effect (at page 18) is disingenuous. The eleventh circuit simply noted that the "intramilitary administrative procedures which the Court found adequate to redress the servicemen's racial discrimination complaints in *Chappell* [the Board for the Correction of Naval Records and the Uniform Code of Military Justice] are clearly inadequate to compensate Stanley for the violations complained of here." (12a-13a).

The eleventh circuit was correct on this point. The administrative remedies which would have fully compensated the plaintiffs in *Chappell* for the type of wrong inflicted in that case (retroactive back pay and promotions, and correction of naval records) would be meaningless to Mr. Stanley in the present case. Such remedies cannot correct the constitutional wrong done to Mr.

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10. Veterans benefits are not equally effective as recovery under the Constitution since it neither makes the Plaintiff whole nor does it deter future abuses of power as does a *Bivens* action.

Stanley since, unlike *Chappell*, he is not just claiming the army cheated him out of money, or a promotion, or put unfair performance evaluations in his records. His claim is a tort claim and a constitutional claim, which has already been denied at the administrative level by the Army Claims Service. (70a, n. 5). Whatever Congress' "activity in the field" is supposed to be here, it has not helped Mr. Stanley very much.

IV. The State Petitioners

The main argument raised by the state petitioners in Case No. 86-443, concerning the civil rights statutes, 42 U.S.C. §§1983 and 1985, is actually a non-issue before this Court since neither of the lower courts addressed it. The eleventh circuit below expressly declined to address the civil rights claims because; "not only have those claims not been addressed by the district court, but they are also beyond the scope of the issue for which we certified this interlocutory appeal." (22a). There are motions to dismiss the civil rights claims that are still pending in the district court. (State Petition at p. 9, n. 2). The state petitioners admit (at p. 9) that the civil rights claims against them have not yet been addressed by the lower courts. Accordingly, that issue is not presented for review to this Court at this time.

In *Chappell*, although this Court addressed the *Bivens* action it expressly declined to address the civil rights action under 42 U.S.C. §1985 because it had not been addressed by the circuit court of appeals. *Chappell*, *supra* at 103 S.Ct. 2368, n. 3.

To the extent the state petitioners assert they were "civilian employees, agents of the military" (p. 11), we mentioned before there is no evidence of that. There is

no evidence yet whether they were civilian employees, independent contractors, or joint venturers.

The individual defendants (state and federal) are entitled, of course, to raise a *qualified* immunity defense if they acted in good faith (although that has not yet been pleaded). *Butz v. Economou*, 438 U.S. 478 (1978). Their arguments regarding the minor extent of their participation and their good faith are both outside the record and only relevant anyway to a qualified immunity defense.

The state petitioners argue that failing to grant them complete immunity in this case will inevitably result in state universities withholding their assistance and expertise from the military. That is no more true than the assertion that failing to grant governmental contractors who build military products a complete immunity from suit by injured servicemen will result in drying up the source of all such contracts. Some courts (including the eleventh circuit) have recognized a *limited* government contractor immunity in the case of defective military products;[11] but here the state defendants ask for *complete* immunity before the facts revealing the nature and extent of their involvement have even been discovered.

If the issue was properly before this Court we would agree that the policy factors applying to the allowance or prohibition of a *Bivens* action against federal officers are logically applicable to a civil rights action against state officers. We would also rely on the previous discussion concerning a *Bivens* action and FTCA action under the unique facts in this case.

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11. *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

If certiorari review is accepted, the Petitioners have substantially argued the merits already, as we have had to do in response, and further briefing would be repetitive. We believe this Court could invoke Supreme Court Rule 23 (1), and consider the merits on the basis of these briefs.

Respectfully submitted,

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November, 1986

APPENDIX

APPENDIX A

DOCKET ENTRIES

CIV JAG 8141

STANLEY, JAMES B.
Plaintiff,

vs.

CENTRAL INTELLIGENCE AGENCY; UNITED STATES DEPARTMENT OF DEFENSE; U. S. ARMY; (JOSEPH R. BERTINO, M.D. BOARD OF REGENTS UNIVERSITY OF MARYLAND; H.D. COLLIER; ALBERT DREISBACH; BERNARD G. ELFERT, M.D.; RICHARD HELMS; GERALD KLEE, M.D.; VAN SIM, M.D.; WALTER WEINTRAUB; M.D. & UNKNOWN INDIVIDUAL FEDERAL & STATE AGENTS & OFFICERS.)
Add'l defts. per 2nd amended complaint,
Defendants.

PERSONAL INJURY: 28 U.S.C.A. 1346(b), 2671 et seq.

SUIT FOR DAMAGES:

CAUSE

Alleges defts' were negligent in administering the drug (LSD) in the experimentation, tests.

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DATE	NR.	PROCEEDINGS
1982		
Sept 8	131	NOTICE of Supplemental Authority by defts. (Pleading from Appeal U.S. District Court for the District of South Dakota # 82-1041).
21	132	NOTICE of Supplemental Authority by defts.
Oct 6	133	NOTICE of Supplemental Authority by defts.

8 134 LETTER from Richard A. Kupfer, Esq., to Judge Gonzalez, Jr. RE: Pending Pleadings & Assistance to court in Resolving Pending Issues.

8 135 LETTER from Richard A. Kupfer, Esq., to Judge Gonzalez, Jr., RE: Oral Argument on 11/12/81 & Whether Bivens cause of Action can be said to accrue.

8 136 NOTICE of Supplemental Authority by Pltf.

15 137 ORDER (JAG) Upon Defts' Motion to Dismiss or in the Alternative Motion for Summary Judgment it is ORDERED that claims against Gov't brought under Federal Tort Claims Act, the Motion to Dismiss is GRANTED. As to Claims against the Gov't brought pursuant to Bivens, the Motion to Dismiss is GRANTED. As to Claims against the Unknown Individual Federal Agents & Officers, the Motion to Dismiss is DENIED. (EOD 11/3/82) (see original pleading for details).

29 138 MOTION for Partial Final Judgment by defts., Central Intelligence agency, U.S. Dept of Defense, U.S. Army & U.S. of America. NR

29 139 MEMORANDUM of Law in Support of above Motion.

29 140 SUGGESTION of Interest of the U.S.

Nov 3 141 MOTION for Extension of Time to Respond to Defts' Motion for Partial Final Judgment by Pltf. NR

10 142 ORDER (JAG-11/09/82) Motion for Partial Final Judgment by Deft., USA is Granted; The clerk to enter final judgment in favor of USA; Claims against individual defts. vacated and withdrawn. (EOD-11/15/82). (m-11/24/82).

17 143 MOTION to Proceed with discovery & Have court enter order cancelling Stay of Discovery by Pltf. NR 152

18 144 MOTION for rehearing by pltf. NR 151

18 145 RESPONSE to Motion for Partial Final Judgment & Suggestion of Interest by Pltf.

18 146 CERTIFICATE of service of Motion for rehearing & Response to Motion for partial final judgment by pltf.

18 147 ORDER (JAG-11/17/82) DENIED as Moot Pltf's Motion for extension of time to respond to deft's Motion for partial final judgment. (EOD 11/23/82)

22 148 OPPOSITION to Pltf's Motion to proceed with discovery & have court enter Order cancelling stay of discovery by defts.

23 149 FOURTH Notice of Supplemental Authority by Pltf.

30 150 REPLY to motion for rehearing and response by defts.

Dec 10 151 ORDER (JAG-12/8/82) denying pltf's Motion for rehearing of court's Order 11/9/82. (EOD 12/14/82)

16 152 ORDER (JAG-12/15/82) granting pltf's motion to proceed with discovery & vacating court's previous order staying discovery. (EOD 12/21/82)

APPENDIX B

(Filed May 14, 1984)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-2018
84-2019

JAMES B. STANLEY,
Plaintiff-Respondent,

versus

UNITED STATES and JOSEPH
R. BERTINO, Et Al.,
Defendants-Petitioners.

Appeal from the United States District Court for the
Southern District of Florida

Before GODBOLD, Chief Judge, RONEY and TJOFLAT, Circuit Judges.

BY THE COURT:

IT IS ORDERED that motion Federal defendants for permission to appeal pursuant to USC 28 1292(b) is denied.

IT IS FURTHER ORDERED that motion of Maryland defendants for permission to appeal pursuant to USC 28 1292(b) is denied.